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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1967

No. 613

GEORGE EPCAR COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ~~COURT~~

EDWIN JASON DRYER
1201 Shoreham Building
Washington, D. C. 20005

IRVING H. BIELE
HOWARD N. JONES
117 East 4th South
Salt Lake City, Utah 84111

Of Counsel:
MEYERS AND DRYER
1201 Shoreham Building
Washington, D. C. 20005

Of Counsel:
BIELE, JONES AND MURPHY
117 East 4th South
Salt Lake City, Utah 84111

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IN THE SUPREME COURT OF THE UNITED STATES

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No.....

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ~~COURT~~

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled cause on May 8, 1967.

CITATIONS TO OPINIONS BELOW

The opinion in the United States Court of Appeals for the Tenth Circuit is reported at 377 F.2d 225 and is appended hereto as Appendix A. The Findings of Fact, Con-

clusions of Law, Judgment and Decree of the United States District Court for the District of Utah, Central Division, are appended hereto as Appendix B. The ~~Appeal for~~ Rehearing ~~and~~ Order of denial of the Tenth Circuit Court of Appeals is appended hereto as Appendix C. The face page and item page of the Invitation For Bid 41-6043, paragraph "3" of the General Sale Terms and Conditions and Article "AB" of the Special Sealed Bid Conditions of the Invitation For Bid are appended hereto as Appendix D. The opinion in the case of *Brown and Son Electric Company* v. *United States of America,* reported at 325 F.2d 466 (Ct. Cl. 1963), is appended hereto as Appendix E. The Government's letter of rejection, Plaintiff's Exhibit No. 1 (Tr-41) is annexed at Appendix F.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was dated and entered May 8, 1967. Rehearing was denied June 28, 1967, and by Orders dated August 4, 1967 and August 28, 1967, issuance of the Mandate was stayed pending Appellant's filing its Petition for Writ of Certiorari on or before September 13, 1967. The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

QUESTIONS PRESENTED

1. Did the Government create a condition precedent to the consideration of a citizen's bid when in publishing an "Invitation For Bid" it stated that if the citizen's bid was not accompanied by a specific bid deposit the bid would be rejected?

2. If the Government has created a condition precedent to the consideration of a citizen's bid then, may the Government, to suit its convenience, unilaterally waive the condition precedent?

3. As subsidiary to the determination of the above questions it is necessary to determine:

a. whether or not the Government loses its special privileges and is bound by its commitments when it contracts with a citizen in ordinary commerce; and,

b. in the application of federal general contract law, do special conditions denominated as such and inserted subsequent to general conditions control over general conditions; and,

c. in cases where the Government is the draftsman, does federal general contract law require strict construction against the draftsman of the contract?

STATEMENT OF THE CASE

The Government through its Defense Supply Agency desired to sell certain surplus property, and in order to effect a sale thereof circulated an "Invitation For Bid at Sealed Bid Sale" (Tr-11-32). The invitation set forth a description of the property and the conditions under which the Sealed Bid Sale would be conducted. One of the "Special Sealed Bid Conditions" incorporated in the offer was "Article AB." The construction and application of Article AB of such invitation governs this case. Article AB states as follows:

> "Article AB: Bid Deposits. All bids *must be accompanied by a bid deposit of 20%* of the *total amount bid* which must be in the possession of the Sales Contracting Officer by the time set for bid

opening . . . *Any bid which is not* timely *supported by* an acceptable bond or *bid deposit will be rejected as nonresponsive.*" (App. D-4) (Emphasis added)

At the time of the bid opening the Government through its Contracting Officer determined that the Petitioner's bid deposit was insufficient and inadequate to support the total amount of Petitioner's bid and notified Petitioner (App. F). It was also determined that Petitioner's bid was the highest bid submitted for all items offered. (Tr- 37 Par. 6, Tr-38, Par. 10, App. B, Par. 6.)

Petitioner, George Epcar Company, submitted a bid totaling $95,153.56 (App. D). Through inadvertance the bid was supported by a bid deposit of only $15,000.00. A bid deposit of $19,030.71 was required to validate the bid (App. F).

The Government partially rejected and partially accepted the Petitioner's bid (Tr-5, App. D). Petitioner asserts that the bid could no more be partially responsive than a woman be partially pregnant, and that since the bid deposit was insufficient to support the total amount bid, the Petitioner's bid must be rejected as nonresponsive in accordance with Article AB of the Special Sealed Bid Conditions.

The Government contended that the bid was divisible, ignored the fact that the bid deposit was inadequate to cover the "total amount bid" and made an award of that portion of the bid that could be supported by the bid deposit then on file. The Petitioner protested the partial award claiming that his entire bid should be rejected. (Allegation, Tr-3, Par. 15; Admitted, Tr-6, Par. 1.)

After exhausting its administrative remedies, Petitioner brought suit in the United States District Court for The District of Utah, Central Division, under the Tucker Act, 28 USC 1346(a) requesting Judgment determining that no contract between Petitioner and the Government came into existence.

The United States District Court for the District of Utah, Central Division, Willis W. Ritter, Chief Judge, rendered Judgment for the Government, and Appeal was taken.

The Court of Appeals, Tenth Circuit, Hill, Circuit Judge, affirmed the lower Court's Judgment, denied a Petition for Rehearing and Petition for Writ of Certiorari is herein filed.

REASONS FOR GRANTING THE WRIT

1. The Conflict That Has Arisen Between the Rulings of the Court of Appeals and the Court of Claims Should be Put to Rest.

2. The Decision of the Court of Appeals Is in Conflict With the Applicable Decisions of the Supreme Court of the United States.

3. Since the United States Government Daily Becomes More Involved in Commerce With Its Citizens, It is of Extreme Importance to the Government and the Business Community Supporting It That the Court Settle the Contract Law Governing Contracts Between the Government and Its Citizens in Order to Preserve Integrity in Government Contracts.

ARGUMENT

1. The Conflict That Has Arisen Between the Rulings of the Court of Appeals and the Court of Claims Should Be Put to Rest.

In the instant case there was a base bid together with three alternative or supplemental bids. The Court of Claims considered an identical case where there was a base bid and alternative bids and held that the bid in its entirety should be rejected because the bid deposit was not sufficient to cover the total bid which would include all alternatives, and in commenting on this matter the Court stated as follows:

> "... (1) ... the contract officer rejected its bid because the bid bond was only 20% of the base bid, not the full amount bid. The invitation required a 'bid guaranty in a penal sum of 20% (expressed words & figures) *of the bid price*' (emphasis added). It was reasonable to read this as meaning the full amount bid not merely the base bid ... Only the year before, the Comptroller General had demanded strict enforcement of bid bond requirements (which he called 'a material part of the invitation') in order, among other things, to prevent bidders from deciding after opening whether or not to try to have their bids rejected or accepted ..." Brown and Son Electric Company vs. The United States, December 13, 1963, United States Court of Claims, (325 F.2d 446). (App. E)

Subsequent to the date of the above decision and on December 3, 1965, the Defense Supply Agency through the Defense Logistics Supply Center implemented the decision of the Court of Claims as above set forth, and adopted "Special Sealed Bid Conditions" No. 41-6043 one of which is Article AB and as follows:

> "ARTICLE AB: Bid Deposits. All Bids *must be accompanied by a bid deposit of 20%* of the *total amount bid* which must be in the possession of the Sales Contracting Officer by the time set for bid

opening. . . . Any bid which is not timely supported by an acceptable bond or *bid deposit will be rejected as nonresponsive.*" (Emphasis added) (App. D-4)

The decision of the Court of Claims was implemented by appropriate regulations adopted in the Federal Code of Regulations republished on June, 1964, pertinent extracts of which are as follows:

"RESPONSIVENESS OF BIDS (a) To be considered for award, a bid must comply in all material respects with the invitation for bids so that, . . . all bidders may stand on an equal footing and the integrity of the formal advertising system may be maintained . . ." (41 CFR Section 1-2.301, page 421).
"REJECTION OF INDIVIDUAL BIDS (a) Any bid which fails to conform to the essential requirements of the invitation for bids, such as specifications, . . . shall be rejected as nonresponsive . . . (f) Where a bid guarantee is required and a bidder fails to furnish it in accordance with the requirements of the invitation for bids, the bid shall be rejected except as otherwise provided in Section 1-10.102-5...." (41 CFR Section 1-2.404-2, page 427)

The form and type of bid used in procurement is also prescribed and used in sales (41 CFR Section 101-45.304-8, Sub-section 2). Comptroller General Decisions again reenforced the position taken by the Court of Claims as indicated by a recent February 17, 1965 Comptroller General Decision as follows:

"The Bid Bond deficiency cannot be waived as a minor technicality . . . which if permitted would tend to compromise the integrity of the competitive bid system by making it possible for a bidder to decide after bid opening whether or not to make his bid acceptable and therefore correction of the bid bond

may not be acknowledged." (Feb. 1965, B155837) (44 Comp. Gen. Dec. 495)

In the instant case, (*George Epcar Company* v. *United States of America*) where the Plainttiff has petitioned for a writ of certiorari, the face page of the bid form (App. D-1) contained one blank in which the bidder was to insert the total amount of his bid and the amount of bid deposit as follows:

> "... The total amount bid is $..... and attached is the required bid deposit in the form of ..... in the amount of $....." (App. D-1)

A base bid and three alternative and cumulative bids were contained in the interior and detail of the bid (App. D-2). The *total amount bid* was not supported by an adequate bid bond (Exhibit 1 Tr-41) (App. F). Under the Brown decision of the Court of Claims, above cited, the bid would have been rejected for the bid deposit was not adequate.

The Court of Appeals in the instant case, in order to determine that the bid deposit was sufficient, stated in their opinion at page 227: (App. A-7)

> "... We must construe those terms according to federal general contract law.
>
> "... four separate bids were made, not just one bid, and applicable contract law must be applied to this factual situation ..." George Epcar Company v. United States of America, 377 F.2d 225 (1967) page 227.

If the decision of the Court of Claims is followed, Petitioner's bid in the instant case would have been rejected.

(*Brown and Son Electric Company* v. *The United States*, 325 F.2d 446.) (App. E.)

If the decision of the Court of Appeals is followed, then Petitioner's bid may be partially accepted and partially rejected. (*George Epcar Company* v. *United States of America*, 377 F.2d 225 (1967) page 227.) (App. A)

Both Courts in their decision claim that diametrically opposed results arise by reason of the application of federal general contract law to identical fact situations.

It is Petitioner's contention that as a condition precedent to the consideration of the base bid and three alternative and supplemental bids contained in the detail or interior portions of the bid form, *the total amount bid* price must have been supported by an adequate bid deposit.

It is respectfully submitted that the United States Supreme Court should settle the conflict that has arisen by reason of conflicting rulings of the Court of Claims and the Court of Appeals.

2. The Decision of the Court of Appeals Is in Conflict With the Applicable Decisions of the Supreme Court of the United States.

This Honorable Court has long endorsed the proposition that the language of an instrument shall be taken most strongly against the party making the instrument. *Orient Mutual Insurance Company* v. *Wright*, 1 Wall 456 (17 L. Ed 505); *Noonan* v. *Bradley*, 9 Wall 394 (19 L.Ed. 757); *Amereican Surety Company of New York* v. *Pauly*, 170 U.S. 133-160, 18 S. Ct. 552 (42 L.Ed. 977).

This Court has also determined that when the Government contracts with its citizens it is controlled by the same

laws and rules of contract interpretation as govern individuals; *Perry* v. *United States*, 294 U.S. 330, 55 S. Ct. 432 (79 L.Ed. 912); *Hunter* v. *United States*, 5 Pet. 173 (8 L.Ed. 86); *United States* v. *Bostwick*, 94 U.S. 53 (24 L.Ed. 65).

The Supeme Court has specifically held that the principle of strict construction against the draftsman is also applied in cases where the Government is the draftsman of the contract. *Garrison* v. *United States*, 7 Wall 688, (19 L.Ed. 277); *Alcoa Steamship Company, Inc.*, v. *United States*, 338 U.S. 421 (94 L.Ed. 225).

Under the decision of the Supreme Court any confusion of terms must be resolved in favor of the citizen who did not draft the terms and conditions.

It has long been axiomatic in contract interpretation that the specific controls over the general and the Supreme Court has adopted this axiom as indicated by the Court's statement in *Mutual Life Insurance Company of New York* v. *Eliza Maud Hill*, 193 U.S. 551, 24 S.Ct. 558 (48 L.Ed. 788):

> ". . . The ordinary rule in respect to the construction of contracts is this: That where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms, although within its general terms the particular may be included. . . ."

In a case involving a Government drafted contract and a contract interpretation problem similar to the instant case, a District Court applied this accepted rule of construction restoring the principle as follows:

> ". . . However, should there be a possible conflict, the Special Provision, being the last written and

specially inserted into this contract to supplement the General Provisions found in all such contracts, must control. . . ." C. H. McQuagge v. United States, W.D. La. 197 F. Sup. 460, (1961).

and this case was cited by the Court of Appeals in the instant case as correctly stating federal contract law (App. A-7). The general conditions became a part of the standard bid form on March, 1960 (App. D-3), and the Special Sealed Bid Conditions were adopted and incorporated June, 1965 (App. D-3).

The Supreme Court has held that in contract construction the specific governs the general and in any case of confusion of terms the confusion must be determined against the Government as the drafter of the instrument.

The present holding of the Court of Appeals in the instant case violates both of these principles and is at odds with the law of the land.

3. Since the United States Government Daily Becomes More Involved in Commerce With Its Citizens, It Is of Extreme Importance to the Government and the Business Community Supporting It That the Court Settle the Contract Law Governing Contracts Between the Government and Its Citizens in Order to Preserve Integrity in Government Contracts.

The Court of Claims when making its determination applied federal general contract law.

The Court of Appeals in making its decision stated that it was applying federal general contract law.

Since the decisions contain similar fact situations but diametrically opposed legal conclusions, this gives rise to the question, "What is the applicable federal general contract law?".

In order to make a determination in the instant case, it is necessary that two distinct principles of contract law be adopted and applied by the Court. These principles are:

1. That a special condition controls over a general conditions in interpretation and application of contract terms.

2. That an agreement is construed most strongly against the drafter of the agreement.

The Government in the "General Conditions" of its contract in the instant case reserved the right to reject any bids and waive technical defects therein as follows:

> "3. CONSIDERATION OF BIDS . . . The Government reserves the right to reject any or all bids, to waive technical defects in bids, and, unless *otherwise specified* by the Government or the Bidder, to accept any one item or any group of items in the bids, as may be in the best interest of the Government . . . " (Emphasis added) (App. D)[3]

The Government as authorized in the General Condition "specified otherwise" in the bid by including "Special Sealed Bid Conditions" and "Article AB" above referred to wherein it stated:

> "Artilcle AB . . . any bid which is not timely supported by an acceptable bond or bid deposit will be rejected as nonresponsive . . ." (App. D)[4]

The Court of Appeals applied the provision of the General Conditions and allowed the Government to accept one part of the bid. Since the "Special Sealed Bid Conditions" required the rejection of the total bid if the *total amount bid* was not supported by an adequate bond, it was necessary for the Court to determine that the "Special

Sealed Bid Conditions" were subservient to the "General Conditions." The application of contract interpretation principles is contrary to the law of the land as indicated by the decisions of this Court cited in the prior heading.

Further, the Court of Appeals, in order to support its decision, could not have construed the document against the drafter thereof; but, to the contrary, construed the document in favor of the drafter thereof and against the citizen. Construction of the plain words and meaning of the contract would require a decision in favor of the citizen. The words "shall" and "will" as used by the Government draftsman in "Article AB" are both mandatory and imperative and the effect of such verbs must be ignored in order to sustain a judgment against Petitioner. (*Black's Law Dictionary*, 4th ed., pages 1171 and 1771).

It is apparent that the Government desired to retain the maximum latitude possible, and, therefore, inserted in the Invitation For Bid as a general condition that it could accept any group of items in a bid unless otherwise specified. Thereafter in a "Special Sealed Bid Condition," the Government specified that a bid would be rejected if it were not accompanied by an adequate bid deposit (Article AB). Petitioner does not believe that there is confusion in contract terms; but, to the contrary, claims that the General Condition and Special Condition are compatible and provide for rejection of the entire bid if the deposit is inadequate.

The Court of Appeals, in order to reach its decision and apply the general condition, had to determine that there was a confusion of terms in the contract and that the general condition should prevail over special conditions.

In modern society where the Government daily becomes more involved in the affairs of its citizenry and in direct competition with its citizens in many areas, it is extremely important that fixed and calculable rules of contract interpretation be adopted so that when a citizen is in dealing with his Government he may deal on a firm and fair basis with projectable and determinable results.

The Supreme Court should affirm that these two fundamental principles of contract interpretation:

1. That an instrument shall be construed most strongly against the party making the instrument even if the Government is the draftsman.

2. That special provisions being last written and specially inserted in a contract control general provisions

are part of the federal general contract law and applicable in construeting a contract between the Government as one contracting party and a citizen as the other.

CONCLUSION

This case offers the Supreme Court a unique opportunity to restate and reaffirm fundamental contract principles and specifically to delineate that these principles are equally and uniformly applicable to contracts involving the Government as a party.

A review of this case also would settle the confusion between Court Of Claims decisions and the instant Court Of Appeals decision.

It is necessary for the instant case to be reviewed in order to assure integrity in contract regulations involving the Government and its citizens.

Respectfully submitted this 12th day of September, 1967.

Of Counsel:
Meyers and Dryer
1201 Shoreham Building
Washington, D.C. 20005

Of Counsel:
Biele, Jones and Murphy
117 East 4th South
Salt Lake City, Utah 84111

EDWIN JASON DRYER
1201 Shoreham Building
Washington, D.C. 20005

IRVING H. BIELE
HOWARD N. JONES
117 East 4th South
Salt Lake City, Utah 84111
Attorneys For Petitioner

APPENDICES

APPENDIX A

GEORGE EPCAR COMPANY, Appellant,
v.
UNITED STATES of America, Appellee.
Nos. 9150, 9151

United States Court of Appeals, Tenth Circuit

May 8, 1967

Rehearing Denied June 28, 1967

Suit seeking determination that no contract existed between plaintiff and United States as result of plaintiff's answer to bid invitation and seeking return of deposit, and counterclaim for liquidated damages. The United States District Court for the District of Utah, Central Division, Willis W. Ritter, Chief Judge, rendered judgment for government and appeal was taken. The Court of Appeals, Hill, Circuit Judge, held that where plaintiff submitted four bids for four separate groups of surplus army trucks and bids on three groups were to be considered only if bid on first group was successful, and plaintiff was high bidder on all four bids but plaintiff's bid deposit was not adequate to support all four bids but was adequate to support first bid and government accepted first bid and rejected other three bids, plaintiff's entire bid was not nonresponsive and government could exercise expressly reserved right to accept any one item or group of items in bid.

Affirmed.

1. United States — Key 64

Regulation promulgated by general service administrator pursuant to statutory authority providing that when-

ever bid deposit is required by terms and conditions of invitation for bids normal deposit for individual types of sales shall be 20% of total amount bid did not confer any right on plaintiff who submitted bid in response to invitation to assert invalidity of bid for lack of adequate deposit. Federal Property and Administrative Services Act of 1949 § 205(c), 40 U.S.C.A. § 486(c).

2. United States — Key 64

Terms of plaintiff's answer to government's invitation for bids on surplus army trucks were construed according to federal general contract law.

3. United States — Key 64

Where plaintiff submitted four bids for four separate groups of surplus army trucks and bids on three groups were to be considered only if bid on first group was successful, and plaintiff was high bidder on all four bids but plaintiff's bid deposit was not adequate to support all four bids but was adequate to support first bid and government accepted first bid and rejected other three bids, plaintiff's entire bid was not nonresponsive and government could exercise expressly reserved right to accept any one item or group of items in bid. Federal Property and Administrative Services Act of 1949 § 205(c), 40 U.S.C.A. § 486(c).

Irving H. Biele, Salt Lake City, Utah (Howard N. Jones, Salt Lake City, Utah, on the brief), for appellant.

Richard S. Salzman, Atty., Dept. of Justice (Barefoot Sanders, Asst. Atty. Gen., William T. Thurman, U. S. Atty.,

and David L. Rose, Atty., Dept. of Justice, on the brief), for appellee.

Before LEWIS, HILL and SETH, Circuit Judges.

HILL, Circuit Judge.

Appellant, Epcar Company brought this suit under the Tucker Act, 28 U.S.C. § 1346(a) (2), seeking a determination that no contract existed between it and the United States and that, therefore, the government should be required to return a $5,000.00 deposit it had declared forfeited because Epcar was guilty of breach of contract. The government counterclaimed, contending there was a valid contract between it and Epcar, that Epcar had breached the contract, that it was entitled to retain the $5,000.00 as partial liquidated damages, and that it was entitled to judgment against Epcar in the amount of $8,785.76, the balance of liquidated damages due it. The case was tried to the court, which granted judgment as prayed for by the government. Epcar Company appeals.

The facts are these: The government invited bids to purchase all or any portion of 126 surplus Army trucks. The invitation for bids provided that bidders could bid alternatively and condition their bids upon the acceptance or non-acceptance of other alternative bids on a portion of the trucks. The requirement of bid deposits contained in the invitation is at the heart of this lawsuit. That requirement is:

> "ARTICLE AB: Bid Deposits: All bids must be accompanied by a bid deposit of 20% of the total amount bid which must be in the possession of the Sales Contracting Officer by the time set for bid

> opening. * * * Any bid which is not timely supported by an acceptable bond or bid deposit will be rejected as nonresponsive.'"

Appellant received one of these invitations for bids and its agents subsequently submitted a bid.

The government expressly stated in the invitation that it reserved "the right to reject any or all bids, to waive any technical defects in bids, and, unless otherwise specified by the Government or by the bidder, to accept any one item or group of items in the bid, as may be in the best interest of the Government."

Appellant submitted his bid on a form provided by the General Services Administration. That form, signed by appellant's agent, expressly incorporated into the bid all the terms and conditions set forth in the invitation for bids. The bid submitted by appellant provides that, subject to those terms and conditions, he offers and agrees "to purchase and pay for *any* or all of the items or lots of property listed on the attached Item Bid * * * upon which prices are bid, at the price set opposite each item or lot, * * *" (Emphasis added).

Epcar, in effect, submitted four separate "all or none" bids: Bid No. 1 was for items 1 through 83, inclusive, with a unit price of $861.61 or a total price of $71,523.63; bid No. 2 was for items 84 through 110, inclusive, with an item price of $631.31 and a total price of $17,045.37, and for consideration only in the event it was the successful bidder under bid No. 1; bid No. 3 covered items 111 through 126, inclusive, with an item price of $412.16, total price of $6,594.56, and to be considered only if it was successful in

bids Nos. 1 and 2; and bid No. 4 covered all items to be sold under the invitation for a total of $95,353.56 and to be considered only if it was unsuccessful in bids 1, 2 and 3.

Appellant was the high bidder on all four of its bids. 20 percent of the total of bids 1, 2 and 3 is $19,030.71. At the time the bids were opened, appellant had on deposit with the Sales Contracting Office only $15,000.00 — a $10,000.00 bond and a $5,000.00 personal check. Appellant allegedly had directed its bonding company to increase the bond to $15,000.00 but the bonding company failed to do so. Consequently, appellant did not have an adequate bid deposit to support its bids on all the items. However, the amount on deposit was adequate to support bid No. 1. The government then accepted bid No. 1, and because of insufficient deposit declared the other three bids "non-responsive" in accordance with Article AB, set out above. After the award was announced, appellant objected to the government's rejecting its bid on the other items but expressly did not object to the award of bid No. 1.

The Contracting Officer refused to change his award and appellant refused to pay for the trucks awarded to it under bid No. 1. The Contracting Officer thereafter declared that appellant was guilty of breaching its contract. Acting under the bid invitation's liquidated damages provision, which provides that damages for defaulting on a contract shall be 20 percent of the purchase price of the items as to which default has occurred, the Contracting Officer ordered that Epcar's $5,000.00 personal check had been forfeited as partial liquidated damages.

After exhausting its administrative remedies, appellant instituted this suit to recover the $5,000.00 deposit. The District Court ruled it had breached the contract and pursant to the liquidated damages provision ordered the government to retain the $5,000.00 deposit and granted it an additional $8,785.76.[1] In the District Court, and here, appellant's main contention is that the provision of Article AB of the bid invitation which requires a 20 percent deposit on the "total amount bid" mandatorily requires that a bid be accompanied by 20 percent of the aggegate amount of money offered in the bid. Here, apellant claims, its entire bid was, under the language of Article AB, nonresponsive, hence there was no valid offer and there could have been no valid acceptance resulting in a binding contract.

The government contends, first of all, that Article AB was included in the invitations for bids solely for the government's benefit and protection in accordance with regulations issued by the General Services Administration, and appellant cannot take refuge in it to avoid the effect of a valid contract resulting after appellant's voluntarily submitted high bid has been accepted by the government.

The authorities cited by the government to sustain their position stand for the proposition that "Statutes regulating the contracting procedures of officers of the Federal Government are enacted solely for the benefit of the Government and confer no enforceable rights upon persons dealing with it."[2] Article AB was included in the invitation

1. $13,785.76 is 20 percent of all items awarded under bid No. 1 because prior to bid opening, some items were withdrawn.

2. Friend v. Lee, 95 U.S.App.D.C. 224, 221, F.2d 96, 100; Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108; United States ex rel. Brookfield Const. Co. v. Stewart, D.D.C., 234 F.Supp. 94, affirmed 119 U.S.App.D.C. 254, 339, F.2d 753.

for bids pursuant to the General Service Administration's regulation providing that: "Whenever a bid deposit is required by the terms and conditions of the invitation for bids, the normal deposit for individual types of sales shall be 20 percent of the total amount bid."[3] This regulation was promulgated pursuant to Section 205(c) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 486(c), which provides that "The administrator shall prescribe such regulations as he deems necessary to effectuate his functions under this chapter • • • and the head of each executive agency shall cause to be issued such orders and directives as such head deems necessary to carry out such regulations."

[1, 2] The statute and the regulation issued pursuant thereto do not, we think, confer any right on appellant. However, we have more than a statute or regulation. We have a specific provision that has been incorporated into appellant's offer. It is a part of the contractual terms. We must construe those terms according to federal, general contract law.[4]

[3] A complete answer to appellant's argument is that by the plain wording of the instrument by which the bid invitation was answered, four separate bids were made, not just one bid, and applicable contract law must be applied to this factual situation. Appellant, by submitting his bids in this fashion asked appellee to consider the bids separately, which it did. In addition the government ex-

3. 41 C.F.R. § 101-45.304-10(a).

4. McQuage v. United States, W.D.La., 197 F.Supp. 460 and cases there cited; Security Life and Accident Insurance Company v. United States, 5 Cir., 357 F.2d 145; Cate v. United States, S.D. Ala., 249 F.Supp. 414.

pressly reserved the right to so consider the bids and "to accept any one item or group of items in the bid as may be in the interest of the government."

It should be noted that this appeal involves two cases, which were consolidated in the District Court. From the record it appears that this opinion disposes of both cases.

Affirmed.

APPENDIX B

IN THE

United States District Court for the District of Utah

Central Division

GEORGE EPCAR COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil No. C-31-66 and C-46-66

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having been tried to the Court without a jury on June 8, 1966, the Plaintiff appearing by and through its counsel, IRVING H. BIELE and HOWARD M. JONES; the Defendant, United States of America, being represented by WILLIAM T. THURMAN, United States Attorney for the District of Utah, and JACK FAIRCLOUGH, Counsel, Defense Depot Ogden, Ogden, Utah; stipulations as to facts having been entered into; counsel having presented arguments and legal memoranda, and being fully advised in the premises, the Court now makes and enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That Invitation For Bid, 41-6043, was issued November 12, 1965, by the Defense Surplus Sales Office, De-

fense Depot Ogden, Ogden, Utah, soliciting offers for the purchase of 126 amphibian trucks (DUKW'S).

2. That general and special conditions of the Invitation provided, in part, as follows:

> (1) "General Condition No. 3. Consideration of Bids . . . The Government reserves the right to reject any or all bids, to waive any technical defects in bids, and, unless otherwise specified by the Government or by the bidder, to accept any one item or group of items in the bid as may be in the best interest of the Government. Unless the invitation otherwise provides, bids may be submitted on any or all items. . . ."
>
> (2) "General Condition No. 4. Payment. The purchaser agrees to pay for property awarded to him in accordance with the prices quoted in his bid. Payment of the full purchase price, subject to any adjustment pursuant to Condition No. 8, must be made within the time specified for removal and prior to delivery of any of the property. . . ."
>
> (3) "General Condition No. 6. Delivery and Removal of Property. . . . Delivery shall be made at the designated location, and the purchaser shall remove the property at his expense within the period of time originally specified in the invitation or within such additional time as may be allowed by the Contracting Officer. . . ."
>
> (4) "General Condition No. 7. Default. If, after the award, the purchaser breaches the contract by failing to make payment as required by Condition No. 4, or by failing to remove the property as required by Condition No. 6, then the Government may send the Purchaser a fifteen-day written notice of default (calculated from date of mailing), and upon purchaser's failure to cure such default within that period (or such further period as the contracting officer may allow), the purchaser shall lose all

the right, title and interest which he might otherwise have acquired in and to the property as to which a default has occurred. The purchaser agrees that in the event he fails to pay for the property or remove the same within the prescribed time, the Government at its election and upon notice of default shall be entitled to retain (or collect) as liquidated damages a sum equal to 20% of the purchase price of the item (or items) as to which the default has occurred. . . ."

(5) "Special Sealed Bid Conditions. Article AB: Bid Deposits. All bids must be accompanied by a bid deposit of 20% of the total amount bid which must be in the possession of the sale contracting officer by the time set for bid opening. . . . Any bid which is not timely supported by an acceptable bid or bid deposit will be rejected as non-responsive. Any bond or bid deposit received after bid opening will be considered in the same manner as late bids."

(6) "Special Sealed Bid Conditions. Article AF: Tie-in and all or none bids. . . .(1) a bidder may submit a bid conditioned upon the acceptance or non-acceptance of his bids on other line items under this Invitation For Bids. He may also submit bids on an "all or none" basis. . . ."

3. That pursuant to said Invitation, Plaintiff submitted its bid on Standard Form 114-A provided for that purpose which disclosed, on the face side thereof, that a maximum price of $95,153.56 was offered with a deposit of $20,000.00.

4. That on the reverse side of said form, the Plaintiff set forth item by item bids of $861.61 each for items 1 to 83; $631.31 each for items 84 to 110 and $412.16 each for items 111 to 126 with the total of $95,153.56.

5. That the Plaintiff also submitted on the reverse side of said Standard Form, four (4) alternate "all or none" bids as follows:

Alternate Bid No. 1 stated:

"All or none bid for items No. 1 through 83 inclusive; each: $861.61 (as a unit price bid) and $71,523.63 (as total price bid)."

Alternate Bid No. 2, stated:

"All or none bid for items No. 84 thru 110 inclusive: each $631.31 total $17,045.37. Alternate bid No. 2 is only for consideration if I am the successful bidder for Items No. 1 thru 83 inclusive as set forth in alternate No. 1."

Alternate Bid No. 3 stated:

"All or none bid for Items No. 111 thru 126 inclusive; each $412.16 total $6,594.56. Alternate bid No. 3 is only for consideration if I am the successful bidder for Items 1 thru 110 as set forth in alternate bids No. 1 and 2. In the event the Government withdraws any of the items covered by my all or none bids, I desire the remaining items to be considered on an all or none basis."

Alternate Bid No. 4 stated:

"Items 1 thru 126 inclusive, all or none bid: $95,353.56. Alternate Bid No. 4 is only for consideration if I am unsuccessful under alternate bids No. 1, 2 and 3."

6. That Plaintiff was high bidder as to its item by item bids and as to the alternate "all or none" bids.

7. That the deposit submitted totaled only $15,000.00 in the form of a $5,000.00 personal check and an annual bid bond of $10,000.00.

8. That the deposit was not sufficient to constitute 20% of the total price for all items.

9. That the deposit was at least 20% of the total price for alternate "all or none" bid No. 1, which, after items 19, 22 and 29 had been withdrawn, total $68,928.80 requiring a deposit of $13,785.76.

10. That such deposit was not sufficient to constitute 20% of the combined prices for Alternate Bids No. 1 and No. 2.

11. That Alternate Bid No. 1 was not restricted in any way or conditioned upon the award of any other item or alternate bid and was accepted by an award in writing on December 8, 1965.

12. That such award required payment of the full price and removal of the property on or before January 18, 1966, which date was extended to February 7, 1966.

13. That plaintiff did not make payment for and remove the property and was mailed a Notice of Default on February 8, 1966, which fixed February 23, 1966, as the final date for plaintiff to cure his default.

14. That Plaintiff failed and refused to cure the default and on February 24, 1966, Plaintiff was notified in writing that the contract was terminated and that liquidated damages were due the United States in the sum of $13,785.76.

CONCLUSIONS OF LAW

1. That Plaintiff's item bid was modified by the "all or none" bids and only such "all or none" bids could be considered for award.

2. That Alternate Bid No. 4 was non-responsive because of insufficient bid deposit.

3. That Alternate Bids Nos. 2 and 3 were limited by their terms to consideration and award first of Alternate Bid No. 1 and as the deposit was not at least 20% of their combined prices, Alternate Bids No. 2 and No. 3 were non-responsive.

4. That Plaintiff's Alternate Bid No. 1 was a separate and firm bid and was not in any way conditioned or restricted on the basis of consideration or award of any other item by item or alternate bid.

5. That the fact that the bid deposit was not 20% of the total price of all items quoted upon does not preclude a valid award as to Alternate Bid No. 1 as to which the deposit submitted was at least 20% of its total price.

6. That the award of Alternate No. 1 by the Contracting Officer was proper according to the terms of the Bid and the Invitation and resulted in a valid and binding contract embodying all of the terms and conditions of the Invitation and Bid.

7. That Defendant is entitled, under the terms of the contract, to its liquidated damages in the sum of $13,785.76 by reason of Plaintiff's default and Defendant's termination of the contract.

8. That Defendant is entitled to dismissal of the Restraining Order heretofore entered against it; retention of the $5,000.00 deposit check already submitted and Judg-

ment on its Counter-claim in the sum of $8,785.76 as the balance due on said deposit and liquidated damages.

Dated this 4th day of August, 1966.

BY THE COURT:

/s/ WILLIS W. RITTER
Chief Judge

MAILING CERTIFICATE

This is to certify that on the 29th day of June, 1966, I mailed a copy of the above and foregoing Findings of Fact and Conclusions of Law to BIELE, JONES & MURPHY, Attorneys for Plaintiff, at 117 East 4th South Street, Salt Lake City, Utah.

LORRAINE ZAREMBA

IN THE

United States District Court for the District of Utah

CENTRAL DIVISION

GEORGE EPCAR COMPANY, *Plaintiff,* vs. UNITED STATES OF AMERICA, *Defendant.*	}	Civil No. C 31-66 and C-46-66

JUDGMENT AND DECREE

The above entitled cause having been tried to the Court without a jury on June 8, 1966; the Plaintiff appearing by and through its counsel IRVING H. BIELE and HOWARD M. JONES; the Defendant, the United States of America, being represented by WILLIAM T. THURMAN, United States Attorney for the District of Utah, and JACK FAIRCLOUGH, Counsel, Defense Depot Ogden, Ogden, Utah; stipulations as to facts having been entered into and counsel having presented arguments and legal memoranda, and the Court having made and entered its Findings of Fact and Conclusions of Law,

NOW, THEREFORE, Judgment is hereby entered in favor of the Defendant determining that a contract existed between Plaintiff and Defendant pursuant to Plaintiff's Alternate Bid No. 1 and Defendant's acceptance thereof under Invitation for Bid 41-6043.

IT IS FURTHER ORDERED that the Defendant shall retain the $5,000.00 bid deposit check submitted by the Plaintiff.

IT IS FURTHER ADJUDGED that Defendant recover from the Plaintiff the additional sum of $8,785.76, together with interest thereon at the rate of 6% per annum from February 7, 1966, pursuant to its Counterclaim.

IT IS FURTHER ORDERED that the Restraining Order issued heretofore by the Court be and is hereby released.

Dated this 4th day of August, 1966.

BY THE COURT:

/s/ WILLIS W. RITTER
Chief Judge

Judgement Entered as 8/5/66.
Docket 4, Page 227

APPENDIX C

TWENTY-SIXTH DAY, MAY TERM,
WEDNESDAY, JUNE 28th, 1967.

United States Court of Appeal
Tenth Circuit

GEORGE EPCAR COMPANY,
Appellant,

9150-9151

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeals From the United States District Court for the District of Utah

These causes come on to be heard on the petition of appellant for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

APPENDIX D-1

RETURN WITH BID

STANDARD FORM 114-A MARCH 1960 PRESCRIBED BY GENERAL SERVICES ADMINISTRATION REGULATION 1-IV-302.00	IFB 41-6043 **SALE OF GOVERNMENT PROPERTY** **BID AND AWARD** BID OPENING DATE AND TIME: 3 December 1965, 10:00 A.M. MST

BID **(This Section to be completed by the Bidder)**	DATE OF BID: Nov 30, 1965, 19___

In compliance with the Invitation identified on the cover page hereof, and subject to all the General Sale Terms and Conditions (Standard Form 114-C, March 1960 Edition), and any Special Conditions contained in the Invitation, all of which are incorporated as a part of this Bid, the undersigned offers and agrees (as set forth in Condition No. 3 of Standard Form 114-C), if this Bid be accepted within ____ calendar days (60 calendar days if no period be specified by the Government or by the Bidder, but not less than 10 calendar days in any case) after date of Bid opening, to purchase and pay for any or all of the items or lots of property listed on the attached Item Bid page(s) _____ (and, if a detailed description of property is furnished with this Invitation, as more particularly set forth therein) upon which prices are bid, at the price set opposite each item or lot, and unless otherwise specified in the description or in any Special Conditions, to remove the property within * ____ calendar days (10 calendar days if no period specified) after notice of acceptance by the Government. The total amount bid is $ 95,153.56 _____ and attached is the required bid deposit in the form of Annual Bid Bond & $5,000.00 personal check in the amount of $ 20,000.00 total.

* FOR REMOVAL PERIOD, SEE ARTICLE 4C, "TIME FOR REMOVAL"

(Envelopes containing bids must be sealed and marked on the face with the name and address of the Bidder, the Invitation number and the date and hour of opening.)

BIDDER REPRESENTS: *(Check appropriate boxes)*

1. That he [X] is, [ ] is not, a small business concern.* *(See Standard Form 114-C for definition of small business and small business classifications referred to in 2, hereinbelow.)*
2. If Bidder represents he is a small business concern, he further represents his applicable classification as: *(Check one)* [ ] (a); [X] (b); [ ] (c); [ ] (d).
3. (a) That he [ ] has, [X] has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the Bidder) to solicit or secure this contract, and (b) that he [ ] has, [X] has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the Bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer. *(For interpretation of the representation, including the term "bona fide employee," see Code of Federal Regulations, Title 44, Part 150.)*

BIDDER IDENTIFICATION NO:

NAME AND ADDRESS OF BIDDER (Street, city, zone, and State. Type or print)	SIGNATURE OF PERSON AUTHORIZED TO SIGN BID
GEORGE EPCAR COMPANY 3390 BRIGHTON BOULEVARD DENVER, COLORADO. PHONE: 825-7516 ZIP CODE: 80205	Fred Schwartz SIGNER'S NAME AND TITLE (Type or print) Fred Schwartz, authorized agent

ACCEPTANCE BY THE GOVERNMENT **(This Section for Government use only)**	DATE OF ACCEPTANCE: 8 December 19 65
ACCEPTED AS TO ITEMS NUMBERED: Items 1 thru 18, 23 thru 28 and 30 thru 83, 20 & 21;	UNITED STATES OF AMERICA BY D. VALLEJOS (Contracting Officer)
TOTAL AMOUNT: $ 68,928.80	CONTRACT NUMBER: 41-6043-017
	TITLE OF CONTRACTING OFFICER: SALES CONTRACTING OFFICER DEFENSE SURPLUS SALES OFFICE P.O.BOX 38 DEFENSE DEPOT OGDEN STATION OGDEN, UTAH 84401

APPENDIX D-2

SEALED BID SALE NO. TBH 41-6043	ITEM BID PAGE	BID NO. (to be filled in by sales office)

ITEM NO	UNIT PRICE BID	TOTAL PRICE BID	ITEM NO.	UNIT PRICE BID	TOTAL PRICE BID
Alternate No. 1:			1 to 83	$861.61	71,523.63
All or none bid for Items No. 1 thru 83 inclusive;			84 to 110	631.31	17,045.37
			111 to 126	412.16	6,594.56
Each:	$861.61	$71,523.63	TOTAL		$95,153.56
Alternate No. 2:			ALTERNATE Bid #4:		
All or none bid for Items No. ~~84 thru 110~~ inclusive;			ITEMS 1 through 126 INCLUSIVE, ALL OR NONE Bid: $95,353.56		
Each:	$631.31	$17,045.37			
Alternate Bid No 2 is only for ~~consideration if I am the~~ successful bidder for Items ~~No 1 thru 83 inclusive as~~ set forth in alternate no. 1.			ALTERNATE Bid #4 IS ONLY FOR CONSIDERATION IF I AM UNSUCCESSFUL UNDER ALTERNATE Bids No. 1, 2 + 3		
Alternate No. 3:					
All or none bid for Items No. 111 thru 126 inclusive;					
Each:	$412.16	$6,594.56			
Alternate Bid No. 3 is only for consideration if I am the successful bidder for Items 1 thru 110 as set forth in alternate bids no 1 and 2.					
In the event the Government withdraws any of the items covered by my all or none bids, I desire the remaining items to be considered on an all-or-none basis.					

BIDDER NAME, AND BIDDER IDENTIFICATION NUMBER IF APPLICABLE, SHOULD BE ON EACH PAGE	BIDDER IDENTIFICATION NO.	NAME OF BIDDER (type or print) George Epcar Co 3390 Brighton Blvd Denver, Colorado 80205

DLSC FORM 3 MAR 1965 071 (TEST) PAGE NO. 18

APPENDIX D-3

IFB 41-6043

SALE OF GOVERNMENT PROPERTY GENERAL SALE TERMS AND CONDITIONS

Standard Form 114-C
March 1960 Edition
Prescribed By General
Services Administration
Regulation 1-IV-302.00

* * * *

3. CONSIDERATION OF BIDS. The Bidder agrees that his bid will not be withdrawn within the period of time specified for the acceptance thereof following the opening of bids (sixty) [60] calendar days if no period be specified by the Government or by the Bidder but not less than ten [10] calendar days in any case) and that during such period his bid will remain firm and irrevocable. The Government reserves the right to reject any or all bids, to waive any technical defects in bids, and, unless otherwise specified by the Government or by the Bidder, to accept any one item or group of items in the bid, as may be in the best interest of the Government. Unless the Invitation otherwise provides, bids may be submitted on any or all items. ~~However, unless the Invitation otherwise provides, bids may be submitted on any or all items.~~ However, unless the Invitation otherwise provides, a bid covering any listed item must be submitted on the basis of the unit specified for that item and must cover the total number of units designated for that item. In case of error in the extension of prices, unit prices will govern.

* * * *

APPENDIX D-4

IFB 41-6043

DLSC Form 437
Jun 65.

SPECIAL SEALED BID CONDITIONS

* * * *

ARTICLE AB: BID DEPOSITS. All bids must be accompanied by a bid deposit of 20% of the total amount bid which must be in the possession of the Sales Contracting Officer by the time set for bid opening. Deposit Bond — Individual Invitation, Sale of Government Personal Property (Standard Form 150) properly executed, or referenced to an approved Deposit Bond-Annual, Sale of Government Personal Property (Standard Form 151) is acceptable in lieu of the above. Any bid which is not timely supported by an acceptable bond or bid deposit will be rejected as nonresponsive. Any bond or bid deposit received after bid opening will be considered in the same manner as late bids.

* * * *

APPENDIX E

Cite as 325 F.2d 446 (1963)

BROWN & SON ELECTRIC COMPANY

v.

The UNITED STATES

No. 76-61.

United States Court of Claims

Dec. 13, 1963.

Contractor's claim for damages from the government's withdrawing an award and giving it to another bidder. On motion and cross-motion for summary judgment, the Court of Claims, Davis, Judge, held that a bid invitation by a contracting officer was not contrary to the requirement of statute and regulation that awards be made to the lowest responsible bidder merely because the invitation called both for base bids and base bids plus alternates and provided that the award would be made on the lowest responsive base bid, where the base work was about 90% of the total project.

Government's motion for summary judgment denied; contractor's motion for summary judgment granted and judgment entered.

Whitaker, Judge, dissented in part.

1. United States — Key 64

Reasonable interpretation of bid invitation requiring 20% of "bid price" was 20% of full amount of bid includ-

ing base bid plus alternates, though award was to be made on lowest responsive base bid.

See publication Words and Phrases for other judicial constructions and definitions.

2. United States — Key 64

Bid invitation by federal contracting officer was not contrary to requirement of statute and regulation that awards be made to lowest responsible bidder merely because invitation called for base bids and base bids plus alternates and provided that award would be made on lowest responsive base bid, where base work was about 90% of total project.

3. United States — Key 74(12)

Where United States had right to terminate contract, contractor was not entitled to common-law damages including unearned but anticipated profits but only money to which it would have been entitled on termination for government's convenience, though government canceled for reasons later found to be wrong rather than for its convenience. Wunderlich Act, §§ 1, 2, 41 U.S.C.A. §§ 321, 322.

4. United States — Key 74(12)

Where United States terminated contract for reasons later found to be wrong, statutory provision as to government's right to terminate contract for its own convenience and as to computation of damages administratively on such termination did not apply to determine method of determining damages but only to limit amount of recovery. Wunderlich Act, §§ 1, 2, 41 U.S.C.A. §§ 321, 322; Rules of Court of Claims, rule 38(c), 28 U.S.C.A.

5. Courts — Key 465

Where contractor's recovery against United States was not required to be determined administratively and case came to Court of Claims without prior proceeding before agency tribunals, amount of recovery would be determined under rule and trial commissioner would take necessary evidence and make initial determination following as nearly as possible the criteria of termination article of contract, though contract had not been terminated under that article. Wunderlich Act, §§ 1, 2, 41 U.S.C.A. §§ 321, 322; Rules of Court of Claims, rule 38 (c) 28 U.S.C.A.

Thomas M. Gittings, Jr., Washington, D.C., for plaintiff. King & King, Washington, D.C. of counsel.

Edwin J. Reis, Washington, D.C., with whom was Asst. Atty. Gen., John W. Douglas, for defendant.

Before JONES, Chief Judge, and WHITAKER, LARAMORE, DURFEE and DAVIS, Judges.

DAVIS, Judge.

Plaintiff charges the United States with breaking a valid contract by withdrawing the award and giving it to another bidder. In May 1960, the Air Force invited bids for the modification of a building at Robins Air Force Base in Georgia. The invitation called for proposals on certain electrical and construction work designated as the base work; in addition, bids were requested on a number of additive alternate items which were to "be awarded at the option of the Government contingent upon availability of

funds." The invitation stated that the "award will be made on the lowest responsive Base Bid," but also required that bids be entered for both the base bid and all additive alternates. The bid bond requirement was as follows:

> "Bid guaranty in a penal sum of 20% (expressed in words & figures) of the bid price will be required in support of each bid if bid price is in excess of $2,000. (See par. 4 of attached SF22, "Instructions to Bidders.") Failure to submit bid guaranty for receipt by the Government prior to the time fixed for opening of bids is cause for rejection of bid unless failure to do so was a result of delay in the mails for which bidder was not responsible."

When the bids were opened on June 15, 1960, these three bids were the lowest on the base work and those alternates the contracting officer included in the contract at that time:

Bidder	*Base Bid*	*Base Bid Plus Alternates*
Aaron Torch & Sons, Inc.	$341,584	$376,334
Brown & Son Electric Co. (plaintiff)	378,277	412,501
Ga. Southern Const. Co.	380,000	408,634

Plaintiff's bid was accompanied by a bid bond "not to exceed Ninety Thousand & no/100 dollars ($90,000)." Torch's bid bond said "Twenty Percent (20%) of amount bid $68,316.80," and its bid form recited that enclosed was a bid bond "in the amount of 20% of the amount of bid." Georgia Southern's bid bond stated "Twenty Percent (20%) of amount bid."

Torch's bid was the lowest on both the base unit and the total contract work, but the contracting officer, pursuant to a legal opinion from the Base Judge Advocate, re-

jected that bid because the tendered bond was only for 20% of the base bid, not 20% of the total bid. The award was then made, on June 30, 1960, to plaintiff which was the second lowest bidder on the base work (though not on the contract as a whole). The formal contract was executed on July 14, 1960.

Immediately after the award, plaintiff began compliance with the requirement in the Notice of Award that it submit a schedule of material and equipment within 30 days. To obtain the necessary information, plaintiff was compelled (it alleges) to place purchase orders and subcontracts amounting to $265,000 and to obligate itself for other substantial costs (all before July 14th). On July 15th, plaintiff was orally notified to suspend all work because Torch (as well as the Associated General Contractors of America) had protested to the Comptroller General that the award to plaintiff was improper. There followed a written suspension order under the Suspension of Work Clause of the contract. Plaintiff, which had not known of the protests before July 15th, complied with these orders at once.

On September 15, 1960, the Comptroller General upheld the protest and ruled that the award to plaintiff was invalid and that it should go to Torch. On October 6th, the Air Force cancelled plaintiff's contract pursuant to this decision. Plaintiff filed appropriate protests and requested reimbursement by the Air Force. This was refused and the present suit was brought. Both parties have moved for summary judgment on the issue of liability and there is no factual dispute on that aspect.

In *Reiner & Company* v. *United States*, Ct. Cl., 325 F.2d 438, decided today, we treat with a similar case of cancellation of a contract following a General Accounting Office ruling that the award to the plaintiff was improper. In that opinion we discuss (a) the judicial standard for determining the legality of awards made by a contracting officer which are thereafter challenged as illegal, and (b) the measure of recovery for the unhappy contractor with a legal contract which is nevertheless cancelled in such circumstances. Those principles are fully applicable here and we deal with plaintiff's case in their light.

Despite defendant's strong urging, we cannot hold the award to plaintiff to have been so plainly a nullity that the whole contract should now be struck down as illegal. The argument for invalidity is twofold: (i) that in no event was plaintiff the lowest responsive bidder to the invitation as issued, and (ii) alternatively, that the invitation itself must be held invalid. Under the standard set forth in Reiner, we can agree with neither branch.

[1] Torch was undoubtedly the lowest bidder, but the contracting officer rejected its bid because the bid bond was only 20% of the base bid, not the full amount bid.[1] The invitation required a "bid guaranty in a penal sum of 20% (expressed in words & figures) *of the bid price* (emphasis added). It was reasonable to read this as meaning the full amount bid, not merely the base bid. Both plaintiff and Georgia Southern so interpreted it; Torch itself admitted to the Comptroller General that it had intended to make

1. The sum of $68,316.30, set forth in Torch's bond is 20% of $341,584, its base bid. Twenty percent of its full bid, $376,334, would be $75,266.80.

its bond 20% of the full bid; it would be natural for the defendant to desire a bond computed on and covering all the work ultimately covered by the contract. Shortly after the opening, Torch claimed it had made a mistake and attempted to raise the amount of its bond, but, again, it was not unreasonable for the contracting officer to decide that the modification came too late. The invitation had specifically warned that the bid bond had to be received "prior to the time fixed for opening of bids." Only the year before, the Comptroller General had demanded strict enforcement of bid bond requirements (which he called "a material part of the invitation") in order, among other things, to prevent bidders from deciding after opening whether or not to try to have their bids rejected or accepted. 38 Comp.Gen. 532, 536-37 (1959); Comp. Gen.Dec. B-140624, Nov. 23, 1959. See also 39 Comp.Gen. 827, 829 (1960) (rejecting an award to a low bidder who inadvertently submitted a bond for 10% rather than 20%, of the bid); ASPR § 2.403, 32 C.F.R. § 2.403 (1960 Supp.). In his opinion on Torch's protest, the Comptroller General recognized himself that "strict rulings have recently been made with respect to the bid guaranty requirements expressed in the invitation," and he based his different conclusion here on what he called "the unusual circumstances in this case." The contracting officer was not unreasonable in thinking that no such exception should be made to the requirement that bids must conform to the invitation. We do not say that it was wrong or arbitrary for the Comptroller General to take the position he did. We do say that he was not plainly right as a matter of law, or the contracting officer plainly wrong.

Although Georgia Southern's total bid was lower than plaintiff's, its base bid was higher. The invitation said, in the plainest words, that the "award will be made on the lowest responsive Base Bid." The full contract price (including the additives) was not to be the standard. Once Torch's bid was rejected for non-compliance with the bid bond requirement, the contracting officer was required to grant the contract to plaintiff (with its lower base bid) if the terms of the invitation were to be followed. Under the invitation, plaintiff was the next lowest responsible and responsive bidder.

[2] Defendant's alternative contention is that the invitation was invalid because it called for the award to be founded on the base bid alone. This is said to be contrary to the requirement of statute and regulation that awards be made to the lowest responsible bidder.[2] We note, first, that the Comptroller General does not appear to have considered the invitation unlawful. He directed that the award be made to Torch as the low bidder; if the invitation was illegal no award should have been made and the procurement re-advertised under a corrected invitation.[3] Here, too, there is room for dispute, but we believe the contracting officer to have acted reasonably in accord with the "lowest responsible bidder" requirement when he included this provision. Additives are portions of the work which may never be ordered because funds are not available. This procurement came toward the close of the fiscal year end-

2. Price was the only variable factor in this procurement; performance time was fixed by the invitation.

3. The basis of the Comptroller General's ruling is not entirely clear, but on the whole he seems to have treated the inclusion of the requirment that bids be measured by the base proposal as an error or mistake, rather than an illegality.

ing Jun 30, 1960. The invitation went out on May 16th and was to be opened on June 15th. The contracting officer knew on May 16th that he had money enough for the base work but he was uncertain as to the additives. Appropriated money is often very tight just before June 30th. He therefore confined the area of competition to the base bid because, as of May 16th, he and the bidders could only be sure of that much. Perhaps, the chances of including the additives were not large at that time; perhaps he was not sure how many of the five additives could or would ultimately be covered; or it may be that he knew that the additive bids (in themselves) were unlikely to vary very much. These were factors to be considered. True, the contracting officer might have indicated in the invitation that the award would be made on the base work if that was all to be ordered, and on the full contract price if money was found for the additives by June 15th; but this course might have excessively complicated the bidding if one, or some, rather than all, of the additives were finally chosen to be included.[4] We cannot say, on balance, that the contracting officer necessarily violated the "full and free competition" demanded by Congress in choosing as his guide the large core of the procurement, the base work, which was almost 90% of the ultimate project. There was no plain illegality compelling this court so to declare and to deprive plaintiff of all recovery.

---

4. Defendant says that, under the type of invitation used here, bidders would tend to understate their base bids in order to get the contract, and at the same time increase their additive bids out of all measure. This danger exists to some extent, but it is mitigated by the fact that the bidder never knows whether or not the additives will be included; a bidder without this assurance is not likely to understate his base bid by much and therefore true competition will not be destroyed. Moreover, the contracting officer can always reserve the right to reject all bids and to re-let, if the additives turn out to sky-rocket the award.

For these reasons, we hold, under one principle discussed in Reiner, that in the circumstances of this case plaintiff's contract should not be deemed void.

[3-5] Under another principle of Reiner, we hold that plaintiff's recovery is not common-law damages (including unearned but anticipated profits) but the money to which it would be entitled on a termination of the contract for the Government's convenience. (This contract contained such a clause.) Unlike the Reiner case, there is no agreement here as to what that sum would be. It might be argued that this determination should first be made within the Defense Department by the contracting officer and the Board of Contract Appeals. We do not follow that course, however. This is not a case in which the contract was actually terminated (or sought to be terminated) under the termination article. It is a case in which the agreement was cancelled for other reasons, now found to be wrong, but in which the doctrine of *College Point Boat Corp.* v. *United States,* 267 U.S. 12, 15-16, 45 S.Ct. 199, 200-201, 69 L.Ed. 490 (1925) (discussed in the Reiner opinion) "operate[s] to curtail the damages recoverable" when suit is brought for a breach. In such a case, there is no requirement of the contract or the Wunderlich Act, 41 U.S.C. §§ 321-322, that the damages be computed administratively; the termination article is invoked only as the limiting measure of recovery not as its source. The case comes to the court without any prior proceedings before the agency tribunals. Cf. *Stein Bros. Mfg. Co.* v. *United States,* Ct. Cl., No. 389-59, decided July 12, 1963, slip op. p. 5. A trial commissioner can take the necessary evidence and make the initial determination, following as nearly as he can the criteria of

the termination article. Cf. *G. L. Christian and Associates* v. *United States*, Ct.Cl., 312 F.2d 418, 427.

Defendant's motion for summary judgment is denied, and plaintiff's motion for summary judgment is granted. Judgment is entered for plaintiff. The amount of recovery will be determined under Rule 38(c) in accordance with this opinion.

LARAMORE, Judge (concurring):

I concur for the reasons stated in my concurring opinion in *Reiner & Co.* v. *United States*, Ct.Cl. 325 F.2d 438.

WHITAKER, Judge (concurring in part and dissenting in part):

I concur in that part of the opinion which holds that the contract was validly awarded to plaintiff in the first instance, and later was wrongfully cancelled. I dissent from the holding that the measure of damages is prescribed by the termination-for-convenience-of-the-Government clause, which was not invoked. My reasons are stated in my dissent in *Reiner & Co.* v. *United States*, Ct.Cl. 325 F.2d 438.

APPENDIX F

DEFENSE SURPLUS SALES OFFICE
DEFENSE LOGISTICS SERVICES CENTER
Bldg 2A, Defense Depot Ogden
P. O. BOX 38
DEFENSE DEPOT OGDEN STATION
OGDEN, UTAH 84401

PLAINTIFF'S EXHIBIT 1 C-46-66

IN REPLY REFER TO DSSO-UT(CD)

10 December 1965

The George Epcar Company
3390 Brighton Blvd
Denver, Colorado

Gentlemen:

Reference your teletype dated 8 December 1965 protesting awards of items 84 thru 126 of IFB 41-6043.

The total of your bids on this invitation is $95,153.56. Under the terms and conditions of the invitation bids must be accompanied by a deposit of at least 20% of the total bid price. Twenty per cent of your bid was $19,030.71 which should have been the amount of your bid deposit. You submitted only $15,000.00 of this amount with your bid. This left a deficiency of $4,030.71.

As Sales Contracting Officer I am authorized to waive bid deposits that are short an insignificant amount. Usually this is restricted to shortages of less than 1% which is considered a diminimus amount. Your shortage exceeded 21%.

I can find no cause to change the awards as originally made. Therefore, your protest is denied.

Sincerely yours,

D. VALLEJOS
Sales Contracting Officer

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 613

GEORGE EPCAR COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law and judgment of the United States District Court for the District of Utah (Pet. App. B)[1] are not reported. The opinion of the court of appeals (Pet. App. A) is reported at 377 F. 2d 225.

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari. "R." refers to the record on appeal in the court of appeals, nine copies of which have been filed in this Court.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1967. A timely petition for rehearing was denied on June 28, 1967. The petition for a writ of certiorari was filed on September 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a bidder on a government contract who failed to post a bid deposit adequate to apply to all its bids may rely on this failure so as to preclude the government's acceptance of one of its distinct unconditioned bids, for which the bid deposit was adequate.

2. Whether the contracting officer misconstrued the bid deposit requirement in the government's invitation for bids by accepting petitioner's unconditioned Alternate Bid No. 1.

REGULATION INVOLVED

The Regulations of the Administrator of the General Services Administration (41 C.F.R. 101-45.000, *et seq.*) provide in pertinent part (41 C.F.R. 101-45.304-10(a)):

> Whenever a bid deposit is required by the terms and conditions of the invitation for bids, the normal deposit for individual type sales shall be 20 percent of the total amount of the bid. * * *

STATEMENT

On November 12, 1965, the government invited dealers in surplus military equipment to submit sealed-bid offers to purchase 126 Army trucks (R. 21-32). The invitation specified, *inter alia*, that "bids may be submitted on any or all items," and that "[t]he Government reserves the right to reject any or all bids, to waive any technical defects in bids, and, unless otherwise specified by the Government or by the Bidder, to accept any one item or group of items in the bid, as may be in the best interest of the Government" (R. 22; Pet. App. B-2). The invitation permitted bidders to "submit a bid conditioned upon the acceptance or non-acceptance of his bids on other line items under this Invitation for Bids" and also to "submit bids on an 'all-or-none' basis" (R. 26; Pet. App. B-3).

The invitation also required all bids to be supported by bid deposits (Special Sealed Bid Conditions, Article AB) (R. 26; Pet. App. B-3, D-4):

> BID DEPOSITS. All bids must be accompanied by a bid deposit of 20% of the total amount bid which must be in the possession of the Sales Contracting Officer by the time set for bid opening. * * * Any bid which is not timely supported by an acceptable bond or bid deposit will be rejected as non-responsive. * * *

Petitioner's bid was submitted on a standard, two-page, General Services Administration form (Pet. App. D-1, D-2). On the face of the form was inscribed "$95,153.56" as the total amount of petition-

er's several bids (Pet. App. D-1). On the reverse side of the bid form, however, petitioner specified that its offer was comprised of four separate "alternate," "all or none" bids (Pet. App. D-2). Alternate Bid No. 1 was for Items 1 through 83 at a total price of $71,523.63. Alternate Bid No. 2 (total price—$17,045.37) was for Items 84 through 110 and for consideration only if petitioner's Alternate Bid No. 1 was successful. Alternate Bid No. 3 (total price—$6,594.56) was for Items 111 through 126 and for consideration only if petitioner's Alternate Bids No. 1 and 2 were successful. Alternate Bid No. 4 (total price—$95,353.56) was for Items 1 through 126 and for consideration only if petitioner's Alternate Bids No. 1, 2 and 3 were unsuccessful. Petitioner's bid also stated (Pet. App. D-2): "In the event the Government withdraws any of the items covered by my all or none bids, I desire the remaining items to be considered on an all-or-none basis."

Petitioner was the high bidder on all four of its alternate bids (Pet. App. B-4). However, petitioner submitted a bid deposit of only $15,000—a $5,000 check and a $10,000 bid bond (Pet. App. B-4, D-1).[2] While this $15,000 was more than the required 20% of Alternate Bid No. 1 ($71,523.63), it was less than 20% of Alternate Bid No. 2 (which consisted of Alternate

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[2] On the face of the bid (Pet. App. D-1), petitioner stated that it was submitting the required bid deposit in the amount of "$20,000.00 total," which would have been adequate to cover all of the bids. Apparently, petitioner's bonding company failed to comply with instructions to increase the bond (see Pet. App. A-5).

Bid No. 1 plus additional vehicles) and of course less than 20% of all three bids combined. (See Alternate Bids No. 3 and 4, *supra.*) Consequently, the contracting officer awarded petitioner only the trucks covered by Alternate Bid No. 1, which was covered by a sufficient bid deposit and was not conditioned on the acceptance of any of the other bids (R. 3, 6). The remaining bids were rejected because of the insufficiency of the bid deposit (Pet. App. F).

When the awards were announced, petitioner protested the rejection of Alternate Bids No. 2, 3 and 4, but stated expressly (R. 54):

> However, I am not protesting or objecting to award of items 1-83 [Alternate Bid No. 1] to George Epcar Company.

After the contracting officer responded that he was not authorized to waive significant shortages in the bid deposit and thus could not change his award (Pet. App. F), petitioner refused to pay for the trucks awarded to it under Alternate Bid No. 1 (Pet. App. B-5). The contracting officer thereupon ordered petitioner's $5,000 check to be applied in partial liquidation of damages (R. 8).

Petitioner then brought an action in the United States District Court under the Tucker Act, 28 U.S.C. 1346(a)(2), seeking a judgment declaring that no contract existed between it and the government and for that reason refunding its $5,000 bid deposit (R. 1-4). Petitioner contended that by virtue of its own failure to submit a bid bond large enough to cover the total amount of all four of its "Alternate

Bids," all of the "Alternate Bids" were, *ipso facto*, non-responsive to the invitation, and that the contracting officer, therefore, could not accept Alternate Bid No. 1. The government counterclaimed for $8,785.76, the balance of the liquidated damages due it under the contract (R. 6-8). The district court rendered judgment for the government (Pet. App. B) and the court of appeals affirmed unanimously (Pet. App. A).

ARGUMENT

The contracting officer accepted petitioner's Alternate Bid No. 1 since it was covered by a sufficient bid deposit and was not conditioned on the acceptance of any of the other bids. The courts below were plainly correct in ruling that the government's contracting officer properly accepted petitioner's first alternate bid, and that this resulted in a valid and binding contract. The Court of Claims' decision on which petitioner relies does not suggest that the government may not accept a distinct and unconditioned bid for which an adequate bid deposit has been posted. There is no conflict of decisions and further review by this Court is not warranted.

1. Even if we assume *arguendo* that the government's agents failed to obtain from petitioner the bid security required by the Special Sealed Bid Conditions Article AB, this would not afford petitioner an opportunity to renege on its contract after its high, unconditioned bid had been accepted. The bid deposit requirement—which provides a source of liquidated

damages in the event a bidder defaults on its contract—was intended solely for the protection of the government. See *Adelhardt Const. Co.* v. *United States*, 107 F. Supp. 845, 846 (Ct. Cls.); *United States* v. *Stewart*, 234 F. Supp. 94, 100 (D. D.C.), affirmed, 339 F. 2d 753 (C.A.D.C.). And, as the court of appeals noted (Pet. App. A-6, A-7), it is settled that statutes and regulations governing the procedure for contracting with the federal government are enacted for the benefit of the government and are not intended to confer rights on persons dealing with the government. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 126; *American Smelting Co.* v. *United States*, 259 U.S. 75, 78; *United States* v. *N.Y. & Porto Rico S.S. Co.*, 239 U.S. 88, 93. Petitioner thus could not object that the government did not stand on its right to consider the bid non-responsive.

2. In any event, there is no merit to petitioner's contention that in accepting one of its bids the contracting officer misconstrued Special Sealed Bid Conditions Article AB. The sale of surplus government property is governed by the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, as amended, 40 U.S.C. 471, *et seq.*, and regulations issued by the Administrator of the General Services Administration pursuant to Section 205(c) of that Act, 40 U.S.C. 486(c). The Administrator's regulations (41 C.F.R. 101-45.000, *et seq.*) provide in pertinent part (41 C.F.R. 101-45.304-10(a)):

> Whenever a bid deposit is required by the terms and conditions of the invitation for bids, the nor-

> mal deposit for individual type sales shall be 20 percent of the total amount of the bid. * * *

It was pursuant to this provision that Special Sealed Bid Conditions Article AB requiring bid deposits was included in the invitation for bids.[3]

In interpreting the Administrator's regulation, the Comptroller General of the United States has ruled that where a company has submitted a bid deposit adequate to cover only some of the items upon which it has bid, an award may properly be made to the bidder covering those items as to which the deposit is sufficient (*In re California Truck Parts and Equipment Company*, Comp. Gen. Dec. B-141637, 39 Comp. Gen. 617, 618):

> [A] bid which is proper except that the bid bond is not sufficient to cover the entire procurement may be considered for award of such portion as may be adequately covered by the bid security actually submitted so long as division of the award would not be impracticable or contrary to stated limitations either in the bid or the invitation.[4]

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[3] The Federal Procurement Regulations, 41 C.F.R. 1-1.000, *et seq.*, cited by petitioner (Pet. 7), have no application to this case. As their title indicates, those regulations govern only the acquisition of supplies by the government, not the sale of surplus property. See 41 C.F.R. 1-1.000, 1-1.002, 1-1.201, and 1-1.209.

[4] Accord: *In re Alaska Junk Company*, Comp. Gen. Dec. B-149734, decided October 4, 1962; *In re Surplus Tire Sales*, ASBCA No. 9060, decided December 4, 1964, 65-1 BCA (C.C.H.) ¶ 4571.

In order to forestall a practice under which bidders obtained "two bites" by deliberately accompanying their offers

In the instant case, it is not disputed that the bid awarded to petitioner (Alternate Bid No. 1) was "adequately covered by the bid security actually submitted." Nor was a "division of the award * * * impracticable or contrary to stated limitations." As the court of appeals stated, under the "plain wording" of the bid petitioner asked the government "to consider the bids separately," and the government, in its invitation for bids, "expressly reserved the right to so consider the bids and 'to accept any one item or group of items in the bid as may be in the interest of the government' " (Pet. App. A-7, A-8).

Petitioner's reliance upon the decision of the Court of Claims in *Brown & Son Electric Co.* v. *United States*, 325 F. 2d 446 (Pet. 5-9), is misplaced. That case arose under the Armed Services Procurement Regulations, 32 C.F.R. 1.100, *et seq.*, and involved a bid deposit requirement in an invitation for a base bid for certain electrical and construction work, and for a bid for additive alternative items to be awarded contingent upon the availability of public funds. The contracting officer in *Brown* rejected a bid because the bid deposit (which was the required percentage

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with insufficient deposits, the Comptroller General has ruled that proper bid deposits are a material part of bids for government contracts and may not be waived by the contracting officer. See, *e.g.*, 38 Comp. Gen. 532; 38 Comp. Gen. 851; 44 Comp. Gen. 495 (cited at Pet. 7-8). However, the Comptroller General has specifically ruled, in the *California Truck Parts* decision, that those rulings do not apply in a case like the instant one where there is no opportunity for "two bites" by the contractor since he is given no opportunity after bids have been opened to reconsider his offer.

of the base bid) was not the required percentage of the base bid plus the additive alternative items. However, in *Brown*, unlike the instant case, a division of the work would have been "impracticable" and "contrary to stated limitations" [5] in the invitation and bid. The decision in *Brown* does not remotely imply that a contracting officer is precluded from accepting a distinct and unconditioned bid for which there is an adequate deposit. Furthermore, in both *Brown*, and the instant case, the reviewing courts were upholding the decisions of contracting officers. The Court of Claims there expressly stated that it was affirming the contracting officer's decision because it was not "plainly wrong." 325 F. 2d at 449.[6] In the instant case, the courts below found that the contracting officer, in accepting petitioner's Alternate Bid No. 1, had correctly construed the bid deposit requirement. Thus the decision below in no way conflicts with the decision of the Court of Claims in *Brown*.

---

[5] *In re California Truck Parts and Equipment, supra*, p. 8, 39 Comp. Gen. at 618.

[6] See, also, *John Reiner & Co.* v. *United States*, 325 F. 2d 438, 440 (Ct. Cls.), certiorari denied, 377 U.S. 931, where Judge Davis stated for the court:

> In testing the enforceability of an award made by the Government, where a problem of the validity of the invitation or the responsiveness of the accepted bid arises after the award, the court should ordinarily impose the binding stamp of nullity only where the illegality is plain. If the contracting officer has viewed the award as lawful, and it is reasonable to take that position under the legislation and regulations, the court should normally follow suit [footnote omitted]. * * *

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

CARL EARDLEY,
Acting Assistant Attorney General.

JOHN C. ELDRIDGE,
LEONARD SCHAITMAN,
Attorneys.

OCTOBER 1967.

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No. 813

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GEORGE EPCAR COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF TO BRIEF FOR THE UNITED STATES IN OPPOSITION

EDWIN JASON DRYER
1201 Shoreham Building
Washington, D. C. 20005

IRVING H. BIELE
HOWARD N. JONES
117 East 4th South
Salt Lake City, Utah 84111

Attorneys for Petitioner

Of Counsel:

MEYERS & DRYER
1201 Shoreham Building
Washington, D. C. 20005

BIELE, JONES & MURPHY
117 East 4th South
Salt Lake City, Utah 84111

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 613

GEORGE EPCAR COMPANY, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

PRELIMINARY STATEMENT

Respondent, in its Brief in Opposition, has raised points completely apart from the issues presented by the petitioner. Such new matter requires reply and hence this reply brief.

Petitioner presented for resolution by this Court a conflict between the Court of Appeals for the Tenth Circuit (in the instant case below) on the one hand and, on the other, decisions of the Court of Claims and this Court. The conflict concerns 1) a question of general contract law and contract interpretation and 2) whether that general law is binding upon the United States as a party to a contract negotiation.[1] On this issue and this conflict the brief in opposition is virtually silent.[2] Instead that brief makes essentially two points:

1) (Ignoring the applicability of contract law) the government asserts that its regulation and the bid deposit requirement are "solely for the protection of

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[1] More precisely, the questions are whether the government established a condition precedent when it set forth a minimum bid deposit requirement in its "Invitation for Bid" and whether, in the event of failure of this condition precedent, the United States has special powers not enjoyed by private contracting parties unilaterally to waive this condition precedent to the creation of an enforceable contract. (*See* Petition, pp. 2-3.)

[2] The government's only reference to this conflict is to dismiss *Brown & Son Electric Co.* v. *United States*, 325 F. 2d 446 (1963 Ct. Cls.), with the assertion: "The Court of Claims decision on which petitioner relies does not suggest that the government may not accept a distinct and unconditioned bid for which an adequate bid deposit has been posted. There is no conflict of decisions and further review by this Court is not warranted." This merely begs the question presented by the petition which is whether the bid deposit requirement applied to the "total amount bid" (as specified in the Invitation for Bid) or applied separately to alternate bids. The petition and the Court of Claims decision (set out in full as appendix E to the petition) deserve more than such cavalier treatment. Especially so in view of that Court's reference to the trend of the Comptroller General's "strict rulings . . . with respect to the bid guaranty requirements expressed in the invitation" and which support the petitioner here. (Pet. App. E-7.)

the government" and "are not intended to confer rights on persons dealing with the government." (Br. 7)

2) (Ignoring again the applicability of general contract law) the government asserts that the regulations in respect to bid deposit requirements were properly applied by the contracting officer. (Br. 7-10)

We reply to these points.[3]

ARGUMENT

I

THE GOVERNMENT'S RIGHT TO WAIVE ITS REGULATIONS

Petitioner's reply to the government's Point I is merely that petitioner's case does not involve any challenge to the cases cited. They merely establish that "*prospective* bidders" or "*prospective or potential* sellers" cannot complain of irregularity in the application of the government's regulations.[4] But these cases do not abrogate contract law or the rights of a

---

[3] In the interest of completeness we should also note the government's prominent reference to a statement by the petitioner: "I am not protesting or objecting to award of items 1-83 . . .". (Br. 5). The reference and its prominence are misleading. This is but one communication in a course of negotiations and none of the courts below viewed this as any waiver. The factual issue of waiver, if any, would, of course, be for determination by the trial court. There was no such finding.

[4] Italics supplied, *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 126-7 (1939). "It [the Public Contracts Act] was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain." (at 127.)

party when suing or sued by the government on a contract.[5]

II

APPLICABILITY OF THE GOVERNMENT'S REGULATIONS AND COMPTROLLER GENERAL DECISIONS

The government, under its Point II, asserts that "in any event" the contracting officer correctly construed his authority to grant an award when the bid deposit requirement had not been met. We should note, of course, that the discussion of his authority is altogether in terms of the applicable regulations and does not go to the question of *contractual* power. Even within the regulations, however, respondent's case fails.

A. The California Truck Parts Case

The government cites as controlling the *California Truck Parts* case (Comp. Gen. Dec. B-141637, 39 Comp.

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[5] If *Adelhardt Const. Co.* v. *U. S.*, 107 F. Supp. 845 (1952 Ct. Cls.), cited by respondent (Br. 7) is to the contrary then it was overruled by the subsequent *Brown & Son* case, supra. The cases are consistent, however. In *Adelhardt* the United States withheld moneys from a defaulting contractor who claimed that, because he had not submitted the required bid guarantee, "there never was any contract in the first place" (at p. 846). The case is distinguishable from the case at bar in that it turned on a finding of *mutual waiver* of the condition precedent. The contractor was deemed to have waived the bid requirement: ". . . plaintiff still considered that its offer was outstanding" [despite the absence of the guarantee] (p. 846). The Court then added: "Accordingly, we hold that in the circumstances disclosed here defendant [United States] was not legally powerless to accept the plaintiff's bid." Clearly contract law was being applied in its normal context and *each side* deemed to have waived failure of a condition precedent.

Gen. 617, 618). But this decision arose out of a 1959 altercation and was issued in 1960. *Subsequent* to the *California Truck Parts* decision the Comptroller General in three consistent decisions has overruled that case and has held that the bid guarantee provision of the invitation for bid is a material part of the contract and should be strictly enforced, even though the best interests of the government might be served by waiver thereof. Pertinent portions of these decisions are as follows:

> "It was argued that it would be in the best interest of the Government to waive the late filing of the bid bond because the government would thereby effect a saving of a large amount of money; that the bid guarantee requirement in this case is arbitrary and serves no national purpose; and that the government has an inherent right to waive any regulation when, by so doing, the government is benefited."
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> "The new rule (forbidding waiver and variation from bid requirement) insured that in formally advertised procurement all bidders will be competing on a common basis and that the contract will in each case be awarded with reasonable promptness, as required by law to the lowest responsible and responsive bidder. . . . It remains our opinion that the bid guarantee provisions of an invitation for bid should be strictly enforced. . . ." (*Cosmos Industries, Inc.,* 43 Comp. Gen. 268, Sept. 17, 1963.)

See also *Kehne Electric Company,* (43 Comp. Gen. 725, June 21, 1965) and a recent (February 17, 1965) Comptroller General Decision wherein it was stated:

> "The Bid Bond deficiency cannot be waived as a minor technicality . . . which if permitted would

> tend to compromise the integrity of the competitive bid system my making it possible for a bidder to decide after bid opening whether or not to make his bid acceptable and therefore correction of the bid bond may not be acknowledged." (*Maritime Maintenance Decision,* Comp. Gen. Dec. B-155837, 44 Comp. Gen. 495)

Interestingly, this trend of the Comptroller General decisions is confirmed in one of the court cases cited by respondents. In *U. S.* v. *Stewart,* 234 F. Supp. 94 (D.C.D.C. 1964), affirmed, 339 F. 2d 753 (C.A.D.C.) the plaintiffs had submitted a bid for the construction of an underground garage near the Capitol which was the low bid but accompanied by an insufficient bid bond. While they lacked standing to challenge the award to the next bidder under the doctrine of *Perkins* v. *Lukens Steel Co., supra,* Judge Holtzoff noted that *the Comptroller General had ruled that this bid bond insufficiency "barred" award to the Plaintiffs* (at 96).

Finally, it should be noted that the Special Sealed Bid provision here in issue was not adopted until five years after the *California Truck Parts* decision and therefore the effect of this special provision could not have been considered there despite the government's suggstion to the contrary (Br. 9).

B. The Fictitious Distinction Between Brown & Son and the Case at Bar

Since *Brown & Son* is a Court of Claims decision clearly at odds with the government's position here (as adopted by the court below) the government's next effort is to distinguish that case. The government asserts: "However, in *Brown,* unlike the instant case

a division of the work would have been 'impracticable' and 'contrary to stated limitations' in the invitation and bid." (Br. 10).

Aside from the fact that this terminology is taken from the *California Truck Parts* case subsequently much curtailed, it does not appear that these factors were even considered by the Court in reaching its decision in *Brown & Son.* Instead the *Brown & Son* decision turned on the normal meaning of the bid language and the Court found that "20% of the bid price . . ." meant "the full amount bid, not merely the base bid." (Pet. App. E-6). Having so interpreted the bid language, the Court then ruled in favor of rejection of the bid with the insufficient bond. The same action is required here.

CONCLUSION

The references contained in the government's Brief in Opposition are basically red herrings. The simple issue presented to the Supreme Court is the determination of whether or not the fundamental principles of contract interpretation should be applied equally and uniformly in interpreting contracts wherein the government is involved as a party. It is respectfully submitted that the writ of certiorari should be granted and this Honorable Court should settle the confusion among existing decisions and reaffirm that fundamental contract law applies in interpreting contracts where the government is a party.

Respectfully submitted this 28th day of November, 1967.

EDWIN JASON DRYER
1201 Shoreham Building
Washington, D. C. 20005

IRVING H. BIELE
HOWARD N. JONES
117 East 4th South
Salt Lake City, Utah 84111

Attorneys for Petitioner

Of Counsel:

MEYERS & DRYER
1201 Shoreham Building
Washington, D. C. 20005

BIELE, JONES & MURPHY
117 East 4th South
Salt Lake City, Utah 84111